The University of Chicago

THE ATHENIAN JUROR AND HIS OATH

A PART OF A DISSERTATION SUBMITTED TO THE FACULTY OF THE DIVISION OF THE HUMANITIES IN CANDIDACY FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF GREEK LANGUAGE AND LITERATURE

1934

By

JAMES FARLEY CRONIN

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PREFACE

The Athenian dicasts were both judges and jurors, but in this dissertation for the sake of convenience the words, 'juror' and 'jury,' are used as equivalents of 'dicast' and 'dicastery.' The translations of the Loeb Classical Library have beer used as far as possible. For Demosthenes the version of Kennedy has been used. The investigation of this subject was suggested to me by Professor R. J. Bonner, of the University of Chicago, while I was attending his seminar in Aristophanes. I am much indebted to his advice and valuable criticism. I am grateful to Professor Gertrude E. Smith for the careful help she has given me. I also thank Professor A. P. Dorjahn, of Northwestern University, for his active interest.

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CHAPTER II

THE JUROR AND HIS OATH

The Athenian jury was constructed to be a great organ of opinion. Since it represented the whole citizen body and in make-up was a cross section of the people, its opinion was the common opinion of Athens. All the forces which worked on the Athenians would work on it. The chief means by which the opinion of the jury could be guided was the oath. According to the reconstruction of Frankel[1] it was as follows:

> I shall vote according to the laws and the decrees of the Athenian people and the Council of the Five Hundred, but concerning things about which there are no laws, I shall decide to the best of my judgment, neither with favor nor enmity. I shall judge concerning those things which are at issue and shall listen impartially to both the accusation and the defense. I swear these things by Zeus, by Apollo, by Demeter. May there be many blessings on me if I keep my oath, but if I break it may there be destruction on me and my family.

In the mind of Solon or the men who drafted the oath,[2] it certainly represented the attitude they thought the juror ought to have and the things he ought to do or not to do. Notwithstanding the fact that conditions had made the jury different from that for which the oath was drafted, it still must have represented the juror's ideal attitude toward his office.

There is scarcely an oration that does not have some gen-

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[1] "Der Attische Heliasteneid," Hermes, XIII, 464.

[2] Although there is no direct evidence, it is likely that the oath dates from the time of Solon. The name, ὁ ἡλιαστικὸς ὅρκος proves that it was in existence before the establishment of the dicasteries. Cf. Bonner and Smith, The Administration of Justice from Homer to Aristotle, I, 162.

eral appeal to the oath. Usually this is a mere commonplace in a prooemium as, "Hear me to the end. And then only reach the verdict which appears to you best and most in accordance with your oath."[1] Frequently a similar appeal is found in the peroration. A type form might be, "thus you will vindicate me and at the same time you will cast your vote in accordance with the laws and your oath." At times the appeal to the oath might rise to a high degree of rhetoric.[2] These appeals are, to be sure, commonplaces, yet there must have been some reason back of them. The purpose is, as Bonner[3] says, an attempt to emphasize the personal responsibility of the individual jurors.

In respect to the specific clauses of the oath, litigants, on account of the nature of their cases, often try to induce the jury to disregard strict interpretation of the oath, attempt to play one clause against the other, and at times strive for the strict interpretation. Also the rhetoricians, by giving suggestions, rules, and formulae, aid the litigants to attain their purpose. These attempts throw light on the attitude of the jurors toward the clauses of the oath and at the same time indicate how closely the Athenian juror approached the ideal set by the oath.

Laws and Decrees

By the Heliastic oath the jury swore to vote in accordance with the law, but concerning things about which there were no laws to decide to the best of its judgment. This phraseology seems definite enough but the very addition of the second clause shows

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[1] From Navarre, La Rhétorique Greque avant Aristotle, translated by Bonner in Lawyers and Litigants in Ancient Athens, p. 153.

[2] Cf. Dem. xxv. 11 f.

[3] Lawyers and Litigants, p. 76.

that Solon had to consider and reckon with the personal judgment of the jurors. From the orators and the rhetoricians we find that there was great elasticity in interpretation, the emphasis varying between the law and the judgment of the juror. There was no authority to rule when or how a law should apply. Such questions were totally in the power of the jury.

Aristotle in his discussion of the use of laws in forensic oratory says[1] that if a law is against one's case, one must appeal to universal law, and insist on its greater equity and justice. He then gives five suggested arguments to effect this end. (1) The juror's oath, "I will give my verdict according to my honest opinion," means that one will not simply follow the letter of the written law. (2) The principles of equity and universal law are permanent and changeless, whereas written laws do change. (3) Justice is true and profitable, but sham justice is not, and consequently the written law is not because it does not fulfill the true purpose of law. (4) Justice is like silver and must be assayed by the judges. (5) The better a man is the more he will follow and abide by the unwritten law in preference to the written. If the law is in favor of one's case he gives four suggested arguments for its support: (1) The wording of the oath was not intended to make the judges give a verdict that is contrary to the law, but to save them from the guilt of perjury if they misunderstand what the law really means. (2) No one chooses what is absolutely good, but every one, what is good for himself. (3) Not to use the laws is as bad as to have no laws at all. (4) To try to be cleverer than the laws is just what is forbidden by those codes of law that are accounted best. This discussion shows that it was an established practice of litigants to try to sway

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[1] Rhet., 1375 a 25 ff.

the jury between law and unwritten law. This was not likely to be especially difficult since Thucydides has Pericles say that the Athenians have regard for law whether it was on the statute books or was that unwritten law which cannot be broken without acknowledged disgrace.[1] Although we do not know the law which might be in question or the facts of the case in which it might be used, the arguments in favor of the unwritten law are much stronger than those in favor of maintaining the law. These latter are sophistical. The first argument given in each case does not balance the other. The former says that the oath does not bind the juror to the letter of the law, while the latter says that the oath is thus stated to protect the juror if he misunderstands the law. This suggests that it was at least considered unwise to say that the juror must vote strictly in accordance with the letter of the law. All a litigant could safely do was to remind the jury of the oath and use general rhetorical arguments in favor of the written law.

There is no doubt that Aristotle favored the use of unwritten law and equity in the settling of disputes, rather than the strict interpretation of the written law. By unwritten law he means all the unwritten principles which are supposed to be acknowledged everywhere,[2] and his idea of equity is as follows:

> It is equitable to pardon human weaknesses, and to look, not to the law but to the legislator; not to the letter of the law but to the intention of the legislator; not to the action itself, but to the moral purpose; not to the part, but to the whole; not to what a man is now, but to what he has been, always or generally; to remember good rather than ill treatment, and benefits received rather than those conferred; to bear injury with patience; to be willing to appeal to the judgment of reason rather than to violence; to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the dicast

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[1] Thuc. ii. 37. 3.

[2] Rhet. 1368 b 7.

looks only to the law.[1]

Although Aristotle believed that a consideration of equity ought not in theory to come before the courts, nevertheless he included the discussion of equity and unwritten law in his treatment of forensic oratory. However, we cannot assume that the juror's idea of these things was the same as Aristotle's ethical and philosophical idea. In lauding the πάτριος πολιτεία and the good days when rich and poor lived side by side in harmony, Isocrates[2] says that then in cases of contracts "the judges were not in the habit of indulging their sense of equity but were strictly faithful to the laws." He is censoring the Athenian jurors of his own day for using in too great a degree their sense of equity to the neglect of specific laws. He may of course be exaggerating, but to the juror equity was likely to mean the relation of his personal opinion and knowledge to the facts of the case.

The jurors had a high regard for law, including the whole body of Athenian law taken as a unit, and litigants made use of it to a great extent. The appeals are very general and are found in some form in nearly every speech. A common way of appeal is to say that one's opponents make themselves higher than law or spurn it.[3] The jury should give heed to law else everything is destroyed and thrown into disorder.[4] By punishment the laws are made effective.[5] Men who pass bad laws or trick the laws are just objects of resentment.[6] One speaker says that the jurors

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[1] Rhet. i. 13. 17-19: 1374 b 10 ff.

[2] vii. 33-34.

[3] And. i. 9; Isoc. xviii. 64; xx. 22; Dem. xxi. 66; xxiv. 27; xxxv. 54; xlii. 15.

[4] Dem. xxiv. 152-54; xxv. 24-27; cf. Lys. i. 35-36.

[5] Dem. xxi. 31.

[6] Dem. xxiv. 65, 208, 215.

cannot live with Andocides and the ancestral laws at the same time, but must get rid of one or the other.[1] Dinarchus asks the jury not to exchange the laws for bribe-takers.[2] The jury is asked not to have more regard for the advocates than for themselves and the laws.[3] A speaker uses his reverence for law as evidence of his good faith in a prosecution.[4] Aeschines in his prosecution of Timarchus used public opinion in favor of respect of law and its observance and stability to force conviction once a party is brought to trial.

> Be assured that if Timarchus shall pay the penalty for his practices, you will lay the foundation for orderly conduct in this city; but if he shall be cleared, the case had better never been tried. For before Timarchus came to trial, the law and the name of the courts did cause some men to fear.[5]

Anytus in the prosecution of Socrates used a similar argument.[6] Both Timarchus and Socrates were condemned and perhaps this argument played some part in influencing the minds of the jurors. From the great mass of these appeals we may be certain that the jurors had a prejudice in favor of law. However this regard for the idea of law is closely akin to the feeling for equity and universal law, although its nature is more restricted.

Anaximenes[7] in contrasting kingly with democratic rule states that in democratic constitutions the final appeal on all matters is to the law. Yet an appeal to specific law without the addition of other appeals is rarely made. When specific law is used by itself, generally it is not directly applied on the main issue of the case. It is mainly used as indirect evidence that the action is vexatious, that the character of the opponent is

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[1] Lys. vi. 8; cf. i. 48-50.
[2] Din. iii. 21.
[3] Lys. xv. 8.
[4] Lys. xxii. 2.
[5] Aes. i. 192.
[6] Plato Apol. 29 C.
[7] Rhet. ad Alex. 1420 b 20.

bad, and that there is a general trend of lawlessness which prompts the action.

Nevertheless the citation of written law by itself did not seem sufficient to litigants. There seemed to be need of certain strengthening devices. Anaximines[1] suggests the introduction of the legislator himself and his law. This is a frequent practice of the orators by which Draco, Solon, and the "Legislator" are called to mind in order to impress the jury with the law and make it feel personally responsible.[2] Also it was advisible to make use of previous judgments to show the nature of the lawful.[3] In public cases where there is greater necessity for the use and quotation of law, many times the orator shows in addition that the laws he cites are in conformance with equity and justice. Demosthenes in the case Against Aristocrates makes many appeals to the Homicide Laws.[4] Besides interpretation, words of comment are added which show that these laws are in conformance with justice and equity.[5] In private cases the citation of laws is much more sparingly used. In the greater number of the private orations of Demosthenes no laws are read.[6] In most of the others there are only a few essential laws read, except in cases where the law was necessary to explain the manner of suit.[7] Yet even in these cases the law did not add much, since the litigant took care to show the justice and equity of the things covered by law

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[1] 1422 b 1.

[2] Dem. xxiii. 29, 37, 51, 62, 86; xxiv. 106, 113; xlii. 1; xliii. 62, 68.

[3] Anax. 1422 b 20 ff.

[4] Dem. xxiii. 22-86.

[5] Cf. §§29, 37, 44, 60, 82, 86; also Dem. xxiv. 24, 34, 45.

[6] Orations xxviii, xxx, xxxi, xxxix, xl, xlv, xlvi, xlix, l, li, liii, lv, lvi.

[7] xxxii, xxxiii, xxxiv, xxxvi, xxxvii, xxxviii, xliv.

in relation to his particular case.

It was an advantage for the litigant, if he wished the jury to view the facts of his case in the light of the law, also to show that the laws and the equity of the case were one and the same thing, or that universal law required the same end. Demosthenes has a client say,

> On questions, upon which there are no written laws, you are sworn to decide according to what is right and equitable; so that even had there been no statute on this point, you would be bound to give your decision in my favor.[1]

Leptines[2] was clearly expected to make his defense on ideas of law exemplified by Spartan, Theban, and early Athenian practice. Demosthenes wished to use as a basis of his accusation the laws which the statute of Leptines contradicted. His method is merely to mention those laws and convince the jury that using their own knowledge and opinion they will reach the same decision the laws demand. This passage is important in showing how two Athenians expected the jury to react, the accuser considering that the juror's opinion and the laws demand the same verdict, and the defendant using common law, which is only the opinion of the juror, to show that the laws which granted immunity were not expedient.

In three extant orations the conflict between the law and the opinion of the jurors on the facts of the case formed the basis of the pleas.[3] Lycurgus was the prosecutor in these cases. In all three he tried to get the jury to see that his opponents violated the spirit of the law and that the law did not matter, and tried to take away from the defendants the appeal to the law.

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[1] Dem. xxxix. 40. Cf. Isoc. xviii. 34; Dem. xx. 118; xliv. 7.

[2] Dem. xx. 118.

[3] These are Lycurgus, Against Leocrates, Hyperides, For Lycophron and For Euxenippus.

The defendant in his turn tried to show the audacity of the accuser in taking away his recourse to the law.[1] In the case against Leocrates, the defendant was expected to make his defense on similar grounds. Leocrates was acquitted by a tie vote.[2] This shows that half of the jury was induced by the arguments and examples of Lycurgus to disregard law and vote on the facts of the case as presented by the accuser. When even in a bad case half of the jurors contrary to the law vote according to their judgment, we can be sure that in many cases this was the customary manner of reaching a verdict.

Thus the jury was likely to judge the case not from a consideration of the laws alone, but in the light of their idea of equity. The advice of the rhetoricians and the practice of the orators do not favor the use of law alone. It was necessary to mention the law-giver and interpretations which would make the law more evident and real, precedents, and the suggestion that the law was confirmed by the jurors' idea of equity and justice and that it was to his personal interest. Since this is so, we can infer that the Athenian litigant recognized in the jury a tendency not to give heed to law unless it was in conformance with their own opinion or impressed upon their minds by interpretation, further that the facts of the case were apt to be the real basis of their decision. This tendency developed in two ways. Equity, although it always was the opinion and prejudice of the juror, became equivalent to his mere knowledge. The willingness to hear matters which manifested the equity of a case became a tolerance of anything which might be said on a case no matter how remote from the issue. The oath itself recognizes this tendency by the very fact that it tries to provide against

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[1]Cf. Hyper. iv. 10. [2]Aes. iii. 252.

it. The orators and the rhetoricians seized on the double extension of the idea of equity and developed it to its fullest possible extent. But this would not have been possible without the consent of the jury.

Personal Knowledge

From the preceding discussion we have seen that the equity of a case was of more or at least equal importance with the law, and that this idea of equity was not the same as that of Aristotle. It was the jurors' own idea of equity influenced by his opinion, prejudice and personal knowledge. The knowledge of the juror about the case he was going to try was considerable.[1] The city was not large and the Athenians talked much. In cases which previously in some form or other had come before the courts, arbitrators or the assembly, the jurors must have had knowledge either from hearing them personally or from discussion. Appeals are frequently made to this knowledge.[2] Often the jurors are called to be their own witnesses.[3] Aeschines in his speech against Timarchus[4] says that if the trial were held in another city, he would have asked the jurors to be his witnesses. One of the rules for his ideal state shows that Plato disapproved of this practice.[5] He says that a man may not be judge and witness at the same time and if he becomes a witness he must leave the

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[1] Bonner, Evidence in Athenian Courts, chap. ii, p. 16; chap. xvii. Lofberg, Sycophancy in Athens, pp. 11-12.

[2] Lys. x. 1; Isoc. xvi. 4, 22; Dem. xxi. 1-2, 80, 226; xxiv. 128, 130; xxxvii. 56; xxxix. 13, 16, 22; xlix. 61; lvii. 33.

[3] Lys. x. 1; xii. 61; Lyc. §§19, 29; Dem. xxi. 18; Din. i. 33; iii. 15.

[4] i. 89.

[5] Laws 937 A.

panel. Often the speaker urged the jury to recall or bring something to mind, or to let the speaker assist them in their memory.[1]

There are a few direct requests and statements that the jury use their preconceived opinions. Demosthenes says that the jury should hold fast to what they are convinced is just and bear it in mind until they vote.[2] In another place he says that the matter is decided by each juror in his own mind according to his own principles long before.[3] There are many appeals that the juror disregard everything the speaker and the opponent have said and will say, and pay no attention to the witnesses but use his own judgment and knowledge. Demosthenes says, "You must pass judgment on the facts according to your knowledge; you must pay heed neither to my assertions, nor to him, not even to the witnesses."[4] Aeschines in his speech against Timarchus based his whole case on the knowledge of the jurors. He says that the statute and the constitution forbid him to accuse explicitly, but that the jurors know all about it. Identifying the jurors with the Athenian people, he says that when Timarchus speaks they laugh and raise an uproar should he use any words which contain a possible double meaning.[5] He uses this to make the jury believe that the Athenians in this manner showed their opinion of Timarchus' guilt and consequently they themselves know that he is guilty. To effect this end there are many arguments in this speech.[6] He uses also the Areopagus as an example, saying that they judge on their own knowledge and investigation, and asks the jury to imitate them.[7] He uses as another example the action of the jurors trying an appeal to the court in the case of an individual who

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[1] Ant. v. 71; Dem. xix. 19; xlix. 13.
[2] Dem. xx. 167.
[3] Dem. xxv. 2. Cf. Lys. vi. 54.
[4] Dem. xix. 216. Cf. Dem. xxvi. 21; Din. ii. 5; iii. 15.
[5] i. 70-85.
[6] Cf. §§44, 92-93.
[7] i. 92.

has been excluded from the deme lists. He says that the jurors applaud, when the prosecutor states, "The men of the deme have under oath excluded this man on their own personal knowledge, without any accusation or evidence against him," and that they use this statement of the prosecutor as evidence of guilt.[1] Aeschines won his case.[2] The verdict could only have been due to the knowledge of the jurors either real or imaginary. We may be reasonably sure that the speakers were trying to take advantage of the jurors' knowledge and were forcing the idea that the jury ought to know even if it did not. It was a practice to ask a member of the jury to tell his immediate neighbors in the jury that he knew something or other was true, and undoubtedly in many cases the practice was with honest intent.[3] There is however a criticism of this procedure and admonition to the jury.

> He is vehement in manner, vehement and audacious, and such a crafty knave, that, what he has no witnesses to prove, he will say is well known to you, men of the jury; a trick which all people resort to, who have no good argument to offer. Should he attempt such a trick, put him down; expose him; what any one of you does not know, don't let him fancy his neighbor knows.[4]

The speaker is obviously afraid that his opponent will deceive the jury into believing they ought to know something they really do not know at all.

On the other hand there are some cases which indicate that this knowledge of the jurors was not so great as the orators generally would wish their hearers to believe. Demosthenes says that Aeschines has delayed bringing the prosecution against him because the length of time would enable him to mix up old dates

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[1] i. 77-78.

[2] Dem. xix. 120.

[3] Andoc. i. 37, 46; Dem. xlvii. 44; l. 3; Plato Apol. 19 D.

[4] Dem. xl. 53.

and decrees for his purpose. The trick was not possible immediately after the events, when the jury still remembered the facts and almost knew them by heart.[1] The falsifying or misstatement of historical examples and allusions also assume that the audience has forgotten or never known the true course of events. In many private cases it would have been impossible for the jurors to have personal knowledge. Litigants charge their opponents with having bad cases because they have been unwilling to come before an arbitrator who is acquainted with all the details of the dispute.[2] These examples also strengthen the idea that in many cases the appeals to the jurors' knowledge were to flatter or shame the individual juror into thinking he knows what apparently the rest of them know.

Although the knowledge of the jurors was not all inclusive, yet it was considerable. In many cases it was a valuable asset to a litigant's case which he used to its fullest extent. Even where it did not exist he might try to make the jury believe they knew. When it was impossible for the jury to know he complains and charges that his opponents prefer judges who are unacquainted with the facts and that they shun private arbitration and family conferences.

Extraneous Matter

The second result of the jurors' tendency to judge from their personal opinion was their willingness to hear anything a litigant might say which had even the remotest connection with the case. This was expressly condemned by the oath. This practice was extended by litigants to include abuse of opponents,

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[1] Dem. xviii. 225. [2] Dem. xxvii. 1; xli. 29; lv. 9.

their families and friends, and their relations with the state.[1] Also it was used to lead the jury away from the facts of the case.

The plaintiff had a slight advantage in this practice because the jury was likely to accept his speech as to the point. Everything the defendant might afterwards say, which seemed to go beyond that, ran the risk of being thought irrelevant. The defendant is careful to ask permission to arrange his speech as he wishes. He does this especially when he wishes to bring in a matter to justify himself, or explain circumstances. This is well shown in two essays which were cast in the form of forensic speeches, Plato's Apology and Isocrates' Antidosis. These are as important as real speeches since in their composition only salient features of forensic practice would be introduced. In the Apology Socrates says:

> Hence, just as you would, of course, if I were really a foreigner, pardon me if I spoke in that dialect and that manner in which I had been brought up, so now I make this request of you, a fair one as it seems to me, that you disregard the manner of my speech.[2]

At first the example of the dialect of the foreigner and the word τρόπος, 'manner' would seem to mean peculiarities of delivery, but from the application, "First then it is right for me to defend myself against the first false accusations brought against me, and the first accuser, etc.," it is clear that he refers also to the arrangement and material of his speech. Isocrates says:

> You must not think, however, that what I say in behalf of Timotheus is irrelevant to the present case, nor that I am straying beyond the limits of the indictment; for while it is proper for the layman to say what he has to say in defense of his own actions and then take his seat or else be thought to overdo his case, yet when anyone occupies a position in the eyes of the public as a counsellor and teacher, he must then justify his followers as well as himself.[3]

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[1] Bonner, Evidence, pp. 14-20. Lofberg, Sycophancy, p. 13.

[2] Plato Apol. 17D.

[3] Isoc. xv. 104.

There are similar statements in the other orators.[1] Demosthenes in making such a plea[2] interprets the clause of the oath which directs the jurors to hear both sides of the case alike as giving him permission to arrange his speech as he saw fit.

Yet all this may be flattery of the jury and an attempt by apology to make a good impression while at the same time placing greater emphasis on the arrangement of the speech and matters strictly beyond the issue. Sometimes there is an apparent show of reluctance to depart from the issue. Demosthenes has a client say:

> I might speak of my own administration as demarch which brought me into odium with certain members of the township, as I gave offense by calling on many of them to pay rents for the sacred lands, and to refund some of the public money which they had embezzled, I should be very glad if you would listen to me; but perhaps you would think that such matters were foreign to the question.[3]

The reluctance and apology are part of a well known rhetorical device. He wants to place the extraneous matter he does mention in a stronger light and to leave the jury with the impression that there are even greater things unsaid.

Frequently prosecutors say that what they have already stated would suffice, if these were the only things the defense was going to deal with; but since the defendants are prepared to say such and such, they would like the jury to hear the facts from their side also.[4] This is but an excuse for their own departure from the issue and is put in such a way that, while they put forth a pretence of wishing to speak on the issue, the reason for not doing so falls on the defendant. Then in turn the defen-

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[1] Cf. Hyper. 1, frag. 2; Dem. xxiii. 19.
[2] xviii. 2.
[3] Dem. lvii. 63; cf. Dem. xxxviii. 26; lvii. 58, 66.
[4] Isae. v. 5; Dem. xliv. 5.

dant must, in order to try to correct the impression, speak beyond the issue. Thus there was a vicious circle which led litigants farther and farther beyond the issue. Yet the jury had no prejudice against the practice, else they could have stopped it. Every speech, with few exceptions, has much irrelevant matter.

It seems that all discussion of the jury's listening to things beyond the issue had no effect on the jury. It was a rhetorical commonplace to mention it. It was only when the practice was disadvantageous to the litigant that there are complaints, and even most of these are rhetorical in their nature. Lycurgus says:

> But it is not just that they ask you to cast a just vote while they do not make a just accusation. You yourselves are responsible for these things, gentlemen, for you give this licence to those who come here, although you have the noblest example among the Greeks in the Council of the Areopagus. It is necessary for you, looking to this, not to yield to those who speak beyond the issue . . . . and you will be in a position to give your vote in a way most in keeping with your oaths.[1]

These are the most direct criticisms of the practice in the orators. Yet their purpose was rhetorical even if the complaints were true, since if they really believed that the jury would take their advice and be absolutely true to their oath, their own cases would be lost as soon as they sat down. It is but a denunciation of their opponents and a fear lest these opponents reveal the shallowness of the cases by speaking about things which Aeschines and Lycurgus preferred to leave unmentioned. The exigencies of their respective cases forced them to denounce the practice. Lycurgus, although he shows the true situation, is overzealous; for he is only speaking generally, since in this case he is the accuser. He is only striving to have an air of sanctity about

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[1] Lyc. §§12-13. Cf. Aes. i. 154, 170, 176; Dem. iii. 1-2.

him, in hope that it would cover up the inadequacies of his own accusation.

The only effective complaints can be found in defenses or virtual defenses.[1] A client of Hyperides says[2] that as a result of the extraneous matter presented by accusers, one of two things happens to the defendants. If they try to answer the extraneous slander, they have no time to present their real defense; if they ignore the matters beyond the issue, the dicasts are left with the impression that these things are true. The commonplace complaint is that the jurors are deceived when the opponent speaks beyond the issue.[3] Litigants by this charge did not wish the jury to condemn the practice of speaking off the case, but only to have a feeling of resentment against their opponent. They did not wish the whole practice to be abolished; if it were, their own cases would be hampered; all they wanted was to deprive their opponents of the advantages resulting from extraneous matter. They tried to accomplish this by an accumulation of appeals to prejudice, of which the charge of deception was one. Since the jury heard such charges in nearly every suit, their effect could not have been great. The litigants were not charging their adversaries with ἀπάτη τοῦ δήμου, and they had no idea of prosecuting. This charge was, in the main, rhetorical and hardly more than a conventional harassing of the opponent.

Thus it is very clear that the practice of speaking beyond the issue was exceedingly common and that the nature of the complaints against it had little or no direct effect on the jury.

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[1] Lys. ix. 1-3; Isoc. xvi. 2; Hyper. iv. 31; Dem. xviii. 9, 34; xxvii. 53; xli. 13; lii. 1-2; Demades 7.

[2] 1, col. 8.

[3] Aes. i. 170, 178-79; Dem. xix. 213-16; xl. 61.

There is only complaint when the opponent speaks beyond the case; when the speaker does it there is little apology. When there is a show of reluctance it is only to bring what he does say into stronger light. The practice was bad but inevitable under the system, since the jury was supreme and liked to be the highest interpretors of everything. Consequently the jury wished to hear anything which in any way would help their general knowledge. That they allowed themselves to be led astray by extraneous matter is also clear from the complaints of some litigants. If the jury really thought they were being deceived, by adverse verdicts they could have taught the litigants through experience to desist from the practice. But from Antiphon on through Dinarchus the speakers still depart from the issue. In the homicide courts, however, the litigants took an oath that they would confine their speeches to the matter at issue.[1] Yet even before the Areopagus litigants brought in some extraneous matter.[2]

Attention to Defense and Accusation

Frequently the clause of the oath, by which the jurors have sworn to listen to both sides of the case impartially, is used as an appeal and also in a modified form as a plea for fair hearing. There is scarcely a speech without it. In the Oration on the Crown Demosthenes presents this appeal in its strongest form:

> I conjure and implore you all alike, to hear my defense to the charge in that fair manner which the laws prescribe --laws, to which their author, Solon, a man friendly to you and popular rights, thought that validity should be given, not only by the recording of them, but by the oath of you the jurors: not that he distrusted you, as it appears to me; but seeing that the charges and the calum-

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[1] Cf. Ant. v. 11.

[2] Cf. Lysias iii. 44-48.

> nies, wherein the prosecutor is powerful by being the first speaker, cannot be got over by the defendant, unless each of you jurors, observing his religious obligation, shall with like favor receive the arguments of the last speaker, and lend an equal and impartial ear to both, before he determines upon the whole case.[1]

These appeals fall into several types. One method is to say that the accusers have the advantage because they have the first hearing and that the jurors ought not to be guided by what the prosecution says.[2] Another type of the appeal is to hear the speaker to the end. This is best represented in the Antodosis of Isocrates which is case in the form of a forensic speech.[3] Frequently the appeal is made that the jury should pay more attention to the defense than to the accusation.[4] Aristophanes in the Wasps caught up this appeal and plays with it.

> Bdel.: Come don't decide against us, father, pray don't
> Before you've heard both sides. Phil.: But, my dear boy,
> The thing's self-evident, speaks for itself.[5]

After the chorus have been convinced, they say,

> 'Twas a very acute and intelligent man, whoever it was,
> that happened to say,
> Don't make up your mind till you've heard both sides.[6]

These types of appeal properly belong to the defendant. They are very common and approach a type formula. Yet in many cases they must have been necessary in the opinion of the defendant, especially when the accuser was particularly vehement and aroused anger in the jury. The passages from the Wasps show that Aristophanes regarded the attitude of the dicasts toward the defendant as well known and worthy of his humor and criticism, for

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[1] Dem. xviii. 7; cf. Demades, §1; Ant. v. 4.

[2] Isoc. xv. 17; Hyper. i, col. 7-8; Dem. xviii. 2, 7.

[3] xv. 17. Cf. Ant. v. 3; Andoc. i. 7, 9; Aes. ii. 7.

[4] Lys. xix. 3-5; Dem. lvii. 1; Demades, §3.

[5] Vv. 918-21.

[6] Vv. 725 f.

the first statement of the reformed chorus is in praise of this clause of the oath. All instances of this appeal are reminders to work against the universal human instinct which is at first prejudiced against anyone accused of anything and likely to hear with approval the speech of the accuser.[1] This instinct, although not recognized in Greek and English procedure, is the basis for some Continental systems in which the accused is considered guilty until he can establish his innocence. Thus defendants feared that the accusers would make a profound impression on the jury and this appeal was designed to minimize it. Its weakness or strength depended on the particular circumstances of each case.

But the tendency, which gave credence to the matters which were first presented, was in part balanced by the last impression which the defendant left with the jury. The accuser cannot openly make an appeal for an equal hearing, since it would naturally hurt his case if he did not show confidence in his accusation. He is forced to accomplish this in other ways. Commonly he managed it by an appeal to religion and the gods or public opinion. Lycurgus says, "And you all know well, gentlemen, that although each of you votes secretly, he makes his attitude clear to the gods."[2] Lysias says, "Nor should you suppose that your voting is secret; for you will make your judgment manifest to the city."[3] These passages seem to indicate that prosecutors also feared that the jury might not hear them, but vote influenced by the defendants and their own opinion. Once Lycurgus says, "I ask you, men of the jury, to hear my accusation to the end."[4] An appeal such as this is an extremely rare occurrence.

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[1] Cf. Ar. Wasps, vv. 893, 898, 900 ff.; Demades, §6.
[2] §146; cf. Lys. vi. 53; Dem. xix. 239; lix. 126.
[3] xii. 91.
[4] §16.

It was far more common for the jury not to listen in silence, but to shout out praise and blame and raise a disturbance. Anaximenes recognizes the prevalence of this practice and gives suggestions to those who are confronted with it.[1] While Plato in condemning the practice likens the jurors sitting in court to a noisy throng in a theater.[2] Aeschines in praising the jurors of his father's day, said that they were more severe and would not hear, as they do now, if someone made an illegal motion, but interrupted and made the clerk read the law and the motion.[3] Aeschines in this case speaks as if the practice of interruption had died out, but this is because he wanted the jurors to interrupt Demosthenes and was afraid that they would not. It is only a subtle form of a request. A client of Hyperides says[4] that usually accusers when they wish to weaken the defendants' cases urge the dicasts to interrupt. Since the defendant spoke second it was impossible for him to make a similar plea. The plea not to make an uproar is exceedingly common in both accusation and defence. When a litigant would say anything strange or startling it seems he could expect the jury to cry out and he asks them not to do so.[5] In a defense it might be used to counteract a demand of the prosecution that the jury should not listen in silence.[6] It is perfectly conceivable that at times it was used merely to emphasize a statement.

There are only a few examples where the jury shouted out in praise and commendation. Aeschines says that whenever a man

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[1] Rhet. ad Alex. 1432 b 34--1433 a 35.
[2] Laws 876 B. Cf. Ar. Wasps, vv. 624 ff.
[3] iii. 192.
[4] iv. 10. Cf. Isoc. xx. 22; Dem. xxiv. 65; lvi. 31.
[5] Cf. Lyc. 52; Plato Apol. 20 E; 27 B.
[6] Hyper. i, fr. 2.

has been removed from the deme list and there is an appeal to the court, the jurors applaud the words of the prosecutor when he says, "Gentlemen, the men of the deme have under oath excluded this man . . . . "[1] It suited Aeschines' purpose to say that this was always the reaction of the jury in such circumstances. Aeschines in this same speech[2] says that Demosthenes had told his pupils that by his speech he would call forth bursts of applause from the jury. The reason for the few instances of the jury shouting out in favor is clear. A litigant cannot mention it in his own speech and one's opponents would never do so. There is no doubt that the jury expressed their favor as well as their displeasure.

We have had instances of appeals that the jury raise a disturbance and requests that they should not, but there are very few examples where we actually know that the jury did raise a disturbance. The most notable case occurred in the defense of Socrates. He knew that the unusualness of his defense would cause the jury to cry out and he asks them not to do so. His purpose in this was to be allowed to say what he wanted without physical disturbance; as for the things which caused the outcries, he keeps on giving them. In the same breath in which he asks for silence he gives further cause for disturbance. Xenophon in his Apology of Socrates says that the jurors did raise an outcry when Socrates mentioned his daimonion.[3]

Apollodorus sued Phormio for some money he alleged his father had advanced in connection with the bank. Phormio put in a demurrer and won the case. In a suit for perjury against Stephanus one of the witnesses of the former trial, Apollodorus

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[1] 1. 77 f.
[2] 1. 174.
[3] §14.

says:

> He got the advantage of the opening speech by reason of there having been a special plea, and the case not coming to trial on the general issue; then having read these pieces of evidence, and made a variety of misrepresentations to suit his case, he made such an impression on the jury that they would not hear me speak a single word.[1]

Apollodorus is really trying to get the jury to pity him and to effect this end he distorts what happened to himself in the previous trial. He says that the jury would not hear him speak one word. This is an overstatement and is hardly true. In section 51 he says, "Now these witnesses by giving false evidence on the facts of the case, weakened my arguments on the special plea." This proves that Apollodorus did answer Phormio. Yet the previous statement must have had some basis or he would never have mentioned it. It is probable that in the other case the jury did not listen to his speech in silence, but continually raised disturbances. But in any case they did not prevent him from speaking at all.

Demosthenes accused Aeschines of drunken violence toward a free woman of Olynthus and told the story and its circumstances with considerable detail.[2] In his defense which was given a little while afterward on the same day Aeschines said:

> And I was indignant--fairly beside myself, at the charge, when he accused me of insolence and drunken violence towards a free woman of Olynthus. But I was rejoiced when, as he was dwelling on this charge, you refused to listen to him. This I consider to be the award that you bestow on me for a chaste and temperate life.[3]

On the passage of Demosthenes there is a scholium of Ulpian who says that when Demosthenes made this charge, Euboulus, an advocate of Aeschines, arose and asked the jury whether they would permit Aeschines to be thus slandered. Thereupon the jury arose and

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[1] Dem. xlv. 6.
[2] Dem. xix. 196 ff.
[3] Aes. ii. 4.

stopped the speech of Demosthenes.[1]

The only criticism we have of the practice of asking the jury to pay more attention to the accusation and to raise disturbances is found in the ex parte statements of the orators. Some of these have been mentioned before. Aeschines says:

> I beg you, fellow citizens, to hear me with willing and friendly mind remembering . . . . the cruelty of the man who, speaking to men who are under oath to give equal hearing to both parties, had the effrontery to urge you not to listen to the voice of the defendant. . . . . For the prosecution does not find justification in the minds of the hearers until the defendant has had opportunity to plead for himself, and has proved unable to refute the charges that are preferred.[2]

There is no sincerity in this prooemium. Here Aeschines is afraid that the jury will not listen to him; accordingly, they will be breaking their oaths. Later in the speech when he tells that they stopped the speech of Demosthenes, which was equally against the letter of the oath, Aeschines is pleased with the jury and commends them. There is a similar passage in the Antidosis of Isocrates,[3] but it is merely part of the legal setting of the speech and cannot be used as the personal criticism of Isocrates. His arguments are rhetorical and magnify the practice of the jury in regard to raising disturbances, by implying that an outcry means the jury is entirely hostile. The passage of Isocrates indicates that this was the usual rhetorical method of the orators.

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[1] Ἰστέον ὅτι ἐν τούτῳ τῷ χωρίῳ ἀνέστησαν οἱ δικασταὶ καὶ εἴασαν τὸν ῥήτορα λέγοντα, τοῦ Εὐβούλου συμπράττοντος τῷ Αἰσχίνῃ, μισοῦντος δὲ τὸν ῥήτορα, εἰπόντος αὐτοῖς τοιούτων αἰσχρῶν ἀνέχεσθε λέγοντος ῥήτορος. The reading εἴασαν is not right. Shilleto maintains that it is corrupted from ἔπαυσαν. In the first place it would be most natural that Demosthenes when he published the speech would omit the incident and not admit that the jury prevented him from giving it in its entirety. On the other hand it would be impossible that Aeschines, in the same trial and before the same jury, would say that the jury stopped Demosthenes, if it did not.

[2] Aes. ii. 1-2.

[3] xv. 21-22.

To be prejudiced on account of the charge and to form an opinion from the accusation before the defendant has said anything is the natural human instinct. The author of the oath recognized this and by the inclusion of the phrase, "listen impartially to both accusation and defense," he tried to minimize this common prejudice. But the oath could not efface it. The commonplaces in the orators show that during the accusation the jury may be prejudiced against the defendant and that the defense was expected to follow the order of the accusation. This is entirely reasonable if the accusation is to mean anything at all. The passages in the orators are evidence of the practice of not hearing both sides alike, but give no real evidence of the greatness and degree of the jurors' feeling. The request that the jury pay no attention or refuse to listen to the defense became a rhetorical manner of expressing great anger and indignation and is no indication that the jury would do as they are asked. The plea of the defendant to hear both sides equally or to pay more attention to the defense, while being the result of the original prejudice, has become a rhetorical feature of the introduction and a plea to allow him to depart from the topics and order of the accusation. The practice of delivering written speeches is perhaps the main reason for this commonplace. In actual practice the prejudice against the defendant was counterbalanced by the fact that the defendant had the ear of the jury last and had the advantage of knowing exactly what the points of the accusation were.

There is ample evidence that the jury did not sit still in silence, but continually, during the course of the trial, would express its opinions freely. This would be expected without any evidence, for the jurors were Greeks and there was no authority to enforce order. The jury would express itself equally in cen-

sure and admiration. Disturbances and outcries were doubtless extremely disconcerting to a litigant, especially if he was delivering a speech written in advance by someone else. On the other hand it was advantageous that the litigant know just how the jury was disposed to him, since it would be possible, if he had any native talent, to vary his speech to suit the altered circumstances. Anaximenes recognizes this.[1] If a disturbance occurs at the beginning of the speech, he urges that the litigant attempt to quiet the jury by stock arguments. If a few jurors cry out in the middle of the speech, he should tell them to keep quiet and vote as they please. But if the majority cry out, he should admit that he is wrong, that is, vary his speech. We must also take into consideration the things that caused the outcries. In only a few cases do we know, but there are many passages and even whole speeches which cause us to be amazed and indignant, and to wonder how a jury could have possibly endured to hear them. In many cases the outcries must have been justified. They are evidence at least that the jury was at least listening to both sides of the case.

The jurors' oath falls into two main parts, each part being composed of two members of which one qualifies the other. In the first part this is clear. "I shall vote according to the laws and decrees but when laws do not exist I shall use my best judgment." In the second part there is virtually a similar qualification. I shall vote concerning those things which are at issue, but I shall listen impartially to both accusation and defense. This is the severest interpretation. Everything is clear and there is no inconsistency of terms. In all probability it is

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[1] 1432 b 32--1433 a 35.

the interpretation Solon intended should be foremost in the minds of the jurors. He made the oath strict and inflexible because the experience of acting as jurors was new and because he realized that the jurors in addition to their own personal feelings and prejudices would have other prejudices due to the political and economic conditions of the day and the memory of those immediately preceding. Absolute conformance to the terms of this oath would produce a severe type of justice. Yet, since the juries were composed of Athenians, as the popular courts became courts of first resort and grew in power and jurisdiction, two things were bound to happen.

As far as the jury was concerned, their unhampered and irresponsible power would allow them to feel that the oath was an ideal pattern designed to secure justice. Consequently as long as justice was attained, the spirit of the oath was unbroken. Progressing a little farther in this line of thought, they would find in the two members of each part of the oath, if taken by themselves, slight inconsistencies. There arises a conflict between law and judgment. In the γραφὴ παρανόμων the jurors' decision was more powerful than decrees. Acting as νομοθέται, their verdict could control legislation and annul laws. Their judgment and opinion were greater than laws and decrees. This fact could not help influencing their conception of the first part of the oath. It was their privilege to decide whether a law or their best judgment should prevail in cases where these two things were at variance. This conception influenced the jurors' attitude toward the second part of the oath. The clause, "judge concerning those things which are at issue," is clear enough. But the second clause, "listen impartially to both the accusation and defense," if not taken very closely with the preceding term, might

virtually become, consider impartially what both litigants have to say. In practice this was inevitable, since anything a juror heard would have some influence on him and his decision. The added qualification to the first part of the oath, "with neither favor nor enmity," could be used to support the looser interpretation. The system also forced the jurors to interpret loosely. Each juror knew that his verdict was final. He could in general only acquit or condemn. There was no possibility for pardon. If he based his judgment solely on the facts concerning the issue as they were presented by the litigants, inadvertently he might be judging unjustly and, in essence, violating those parts of the oath which demanded that he listen impartially and forbid him to judge with enmity. Such was the attitude of the juror toward the oath. In his own mind he was not breaking it.

On the other hand litigants, recognizing these same things, learned the attitude of the jurors. Rhetoricians came to their aid. The clauses of the oath presented a framework for rhetorical arguments rich in possibilities. All these possibilities were developed to their highest degree. The slight inconsistencies which were the result of the jurors' own attempt to make the oath flexible were widened into contradictions. One clause of the oath was played against the other. Pleas were developed to work on those feelings of the jurors which had forced them to relax the strict interpretation. In short, litigants and rhetoricians abused the oath and the jurors' conception of it. The jurors became more and more accustomed to this abuse. They came to rely more and more on their own judgment, since litigants with bad cases and those with good cases used the same methods, arguments and appeals. To secure a just verdict the jurors had to interpret the oath more loosely and to consider extraneous matters.

If the oath is considered an ideal pattern framed to guide the jurors toward justice and to curb their natural feelings and prejudices, the Athenian dicasts did not fall very short of achieving its spirit. However the system, which gave the jurors final control and had no provision to govern the speeches of the litigants, forced them to attain this spirit in another way. If the oath is considered only as a set of rules, the jurors did not approach conformity with its terms.

CHAPTER III

THE JUROR AND THE AMNESTY OATHS[1]

In the late spring of 403 after the battle of Munychia, the board of Ten which succeeded the Thirty applied for aid from Sparta. King Pausanias was appointed by the ephors to restore order at Athens. After he checked Thrasybulus in a battle, the Ten were replaced by a second board of Ten. A three party reconciliation with oaths was arranged between the democrats, oligarchs, and the Spartans. As soon as the Peiraeus party returned to Athens, the whole people took the amnesty oaths. These contained the following provisions: the oligarchs were allowed to settle at Eleusis as a semi-independent state; only those who killed or wounded with their own hand were to be tried for homicide; past offenses were not to be remembered against anyone except the Thirty, the board of Ten, the Eleven, and the Ten of the Peiraeus, and not against these if they rendered an account of their office.[2] Connected with the oaths and complementing them were legislative changes. A new set of laws based on the codes of Draco and Solon was drafted. All the old laws and decisions in public cases were annulled. It was no longer permissible to use any of the old laws which were in use before the Archonship of Eucleides. Yet

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[1]The facts involving the amnesty upon which this section is based are from an unpublished Chicago dissertation, The Athenian Amnesty of 403, by A. P. Dorjahn. An abstract of this dissertation appears in Abstracts of Theses, The University of Chicago, Humanistic Series, II, 273-76.

[2]Aris. Ath. Pol. xxxix.

the decisions of private suits and arbitrations were allowed to remain in force. Andocides explains[1] that this was arranged in order to enforce the execution of private law and to avoid abolition of debts and cancellation of judgments. After the fall of Eleusis and the return of the oligarchical sympathizers, those parts of the oath which were still pertinent were reaffirmed.

The dicasts, senators, and perhaps the other magistrates[2] took the amnesty oaths annually. The Heliastic oath was at least augmented by the words, καὶ οὐ μνησικακήσω, οὐδὲ ἄλλῳ πείσομαι, ψηφιοῦμαι δὲ κατὰ τοὺς κειμένους νόμους.[3] How long this addition remained a part of the dicastic oath is unknown. The new clause is not subject to difficulties of interpretation as were the other clauses of the oath. Its meaning was clear. Litigants could not twist and abuse it for their own advantage. Thus the jurors' attitude toward this part of the oath can be safely used as a test of their honesty. However there were two great forces working behind the additional clause. These must be considered in order to discover the true importance of the jurors' attitude toward the oath and the decisions based on it. One was a natural feeling which prompted the Athenians to reconciliation; the other was a deep set prejudice against subverters of the democracy.[4]

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[1] i. 81-89.

[2] G. M. Calhoun, Classical Philology, XVIII, 184, n. 3.

[3] And. i. 91.

[4] There was an inherent trait of mildness in Athenian character which manifested itself in the treatment of tyrants, oligarchs and their followers. Never at Athens did the democrats perpetrate such a reign of terror as the commons at Corcyra (Thuc. iii. 81 ff.). Aristotle says (Ath. Pol. xvi. 10) that the laws against aspirants to tyranny and their followers were very mild at the time of Peisistratus and that, after the democracy was restored, the partisans of the tyrants, who had taken no guilty part in the disorders, were permitted to remain at Athens (Ath. Pol. xxii. 4). The series of amnesty acts show clearly this same trait. Solon allowed all exiles, except those convicted on charges

The slow development which led up to the amnesty oaths and the need of additional legislation after the democracy was fully established show the conflict between these two forces, the

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of tyranny and homicide to return (Plut. Solon 19; cf. G. Smith, "The Prytaneum in the Athenian Amnesty Law," In Class. Phil., XVI, 345 ff.). Before the battle of Salamis there was a similar enactment (Arist. Ath. Pol. xxii. 8). The proceedings taken against those leaders of the Four Hundred who remained at Athens were in all respects legal (cf. Bonner, Lawyers and Litigants, pp. 244 ff.). The decree of Demophantus (410) was severe but it looked to the future. It appears that the Four Hundred were allowed to return if they rendered an account, but those who did not appear for trial were condemned (And. i. 78). Aristarchus was brought to trial, granted a day in which to defend himself, and allowed all his rights under the law (Xen. Hell. i. 7. 28). After the battle of Aegospotami the decree of Patrocleides was passed which was applicable to all who were in exile except those convicted in a homicide court and those of the Four Hundred who did not remain to stand trial (And. 77-79). Pseudo-Xenophon (iii. 12-13) says that at Athens few men were exiled unjustly. He means that the Athenians never banished political groups large enough to jeopardize the democracy. In the case of individuals who were charged with offenses against the state, the leniency of the Athenians expressed itself in a preference for exile rather than death. Grote (VIII, 2) aptly contrasts the mild treatment of Alcibiades by the Athenians with the action the Spartans took against him when he was only suspected. On the other hand the Athenians loved their state exceedingly. To them Athens meant democracy. They knew from their own past experience and that of other cities of Greece that the lack of democracy involved the loss of freedom and advantages. As a converse of love of the state there existed from the beginning a hostility to subverters of the state. Up to the commencement of the Peloponnesian war there was the attempt of Cylon, that of Damasius, and the tyranny of Peisistratus and his sons. Popular legend made the overthrow of the tyrants and the deed of Harmodius and Aristogeiton a democratic victory (Aris. Ath. Pol. xviii; Thuc. vi. 54). As a result anything which was not democratic could be connected with tyranny. During the Peloponnesian War after the death of Pericles, the popular leaders tried by every means to control the people. Knowing that they were dependent on the democracy for everything, they raised up before them a fear of tyranny which included subversion of the state and sympathy with Sparta. Thus the commons imbued with real and imaginary fears was forced to rely on the demagogues for protection. Aristophanes, charging Cleon with this practice, ridicules it (Wasps, 342 ff., 412 ff., 463 ff., 493 ff., 503 ff.). But Cleon was not the first to appeal to this prejudice of the people. The charge of tyranny was a weapon of political warfare. This element entered into the ostracism of Themistocles (Plut. Themis. xxii. 3) and that of Aristeides (Plut. Aristeides vii. 1). Pericles feared he was suspected of aiming at the tyranny (Plut. Per. vii) and Damon was ostracised as a friend of tyranny (ibid. iv. 2). The revolution of the Four Hundred and the rule of the Thirty could not help increasing this hatred toward subverters of democracy.

hatred for the oligarchs and the natural mildness of the Athenians. At first the feeling of hatred was supreme. When the exiled democrats learned that there was dissension in the ranks of the Thirty, they began to look forward to the restoration of the democracy and punishment of their enemies.[1] When Agoratus attempted to join them at Phyle, he was roughly handled and would have been put to death. But Anytus, one of the leaders, asked the democrats to wait until they came back to the city before they punished their enemies.[2] But a gentler and milder feeling soon began to grow. They treated the dead oligarchs after the battle of Munychia with respect[3] and the speech of the herald indicated a willingness for reconciliation.[4] After the amnesty the leaders of the democratic party urged the people to abide by its terms and themselves set a splendid example.[5] They must have felt that the people needed some urging. After the fall of Eleusis the whole people united in paying the debt to Sparta, although it had been agreed that the city party pay it. This act called forth great admiration among the Greeks and writers mention it as a sign of the greatness of Athens.[6] The people acting in a public capacity by this step marked the triumph of the reconciliation. But in private the conflict still continued. Litigants still brought suits that contravened the amnesty, some perhaps on account of confusion as to the precise meaning of the new laws in regard to private suits and contracts.[7] Others were obviously violating the amnesty for private gain.[8] Archinus introduced a law to re-

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[1] Lys. xv. 22.
[2] Lys. xiii. 77-78.
[3] Xen. Hell. ii. 4. 19.
[4] Ibid. ii. 4. 20-22.
[5] Lys. xxv. 28; Isoc. xviii. 23.
[6] Aris. Ath. Pol. xl. 3; Isoc. vii. 67-68; Dem. xx. 11-12.
[7] Isoc. xviii. 7.
[8] Isoc. xviii. 2.

lieve the situation. According to this law, anyone who was sued in a private action which violated the amnesty was permitted to put in a demurrer.[1]

Such was the attitude of the Athenians toward the situation in its constitutional and political aspect. But nothing could efface the terror of the things they had gone through. The Athenians were able to forgive but it was a different matter for them as individuals to forget the wrongs which were done them.[2] This attitude is clearly indicated by the tactics of litigants in cases which involved the Thirty or their followers directly or indirectly. They knew that there still existed deep in the minds of the jurors a latent prejudice and hatred for the oligarchs and their sympathizers. Accusers tried to bring forth these prejudices and thought it was possible to develop them to such a degree that condemnation would result. Defendants also feared it. They say that they belonged to or sympathized with the moderate section of the Thirty, while they admit that the extreme faction deserves punishment.[3] Eratosthenes was expected to use such an appeal in his defense. They also say that they were not active supporters of the Thirty, or that, no citizens suffered by their acts.[4] Any connection with the Thirty continued to be used as character evidence and mention of the Thirty became a rhetorical commonplace. This indicates that once litigants thought that the mere name of the Thirty would have an effect on the jury.

The Athenian juror in his annual oath swore that he would observe the amnesty. Although a desire for reconciliation pervaded the state, still deep in the mind of the individual juror

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[1] Isoc. xviii. 1-2.

[2] Cf. Bury, History of Greece, p. 513.

[3] Lys. xxv. 34-35.

[4] Lys. xvi. 8.

there was the hatred for the subverters of the democracy. This naturally would work against the oath. To this ingrained prejudice accusers appealed with all their power and rhetorical skill. It would take conscious effort on the part of the juror to withstand these appeals and vote according to his oath.

Fortunately the decisions of many cases which involved the amnesty are known, and of some the result can be inferred from internal evidence. The speech of Lysias, Against Eratosthenes, was delivered at the audit of a member of the Thirty. Even though Eratosthenes could not claim the benefits of the amnesty, still in some passages Lysias indicates that he could not place great reliance on the jurors' prejudice against the Thirty.[1] Eratosthenes was acquitted.[2] Pheidon a member of the Thirty and of the first Ten did not withdraw to Eleusis. Since there is nowhere and mention of his condemnation, it is likely that he passed his audit. Aristotle says[3] that Rhinon a member of the Ten was chosen general after the restoration of the democracy. A client of Isocrates calls on Rhinon and his colleagues to give witness for him.[4] These passages show that the Ten, who were definitely excluded from the benefits of the amnesty, not only passed their audits but became citizens of very good standing.[5]

The speaker of Isocrates xviii did not think that such

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[1]Cf. Forbiger, Ausgewahlte Reden des Lysias (2nd ed.; 1880), I, 21-22.

[2]Cambridge Ancient History, V, 375.

[3]Ath. Pol. xxxviii. 3.

[4]Isoc. xviii. 8.

[5]The prosecutors of Andocides also must have been prominent men in the community, yet according to the defendant (And. i. 92 ff.) they owed their safety and citizenship to the amnesty. Although Cephesius before the rule of the Thirty embezzled public money, Meletus effected the arrest of Leon, and Epichares was a member of the boule under the Thirty; no one attempted to prosecute them.

witnesses would cause a prejudice against his case. In his speech of defense at his scrutiny before the Council, Mantitheus says that many of those who served in the cavalry under the Thirty became members of the Council while many others were elected generals and hipparchs.[1] All of these had to pass scrutinies and audits, although the prejudice against the Knights was especially strong, since they accomplished many of the atrocious acts of the Thirty. Andocides based a large part of his defense on the amnesty.[2] The prejudices which were likely to work against him were strong, yet he was acquitted. In this speech he expresses the possibility that his opponents would not obtain a fifth part of the votes.[3] Blass, approved by Lipsius, thinks that these lines would not appear in the written speech if they had not been realized.[4]

Of all the cases which could have involved the amnesty one condemnation is known. But even this case is suspicious. According to Lysias, Menestratus, an informer under the Thirty, was brought to court after the restoration of the democracy as an actual murderer. He was condemned and put to death.[5] Lysias uses this case to provide himself with a parallel to justify the dubious action against Agoratus. This circumstance, considering the looseness of the orators' use of precedent and example and the obvious weakness of the case against Agoratus, leaves the impression that Lysias may be altering the facts. However beyond this one case, although the decisions of some actions are unknown, there is no positive evidence that anyone pleading the amnesty before a jury court was convicted. There is much evidence that

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[1] Lys. xvi. 8.
[2] i. 90, 103, 140.
[3] Andoc. i. 33.
[4] Dalmeyda, Andocide Discours, p. xiii, note 2, Paris, 1930.
[5] Lys. xiii. 55-56.

many even directly connected with the revolution were acquitted. The action of the juries is fully in accord with the general statements of Xenophon,[1] Isocrates,[2] and Aristotle[3] concerning the mildness of the Athenians in this crisis. This conclusion is of greatest importance, since in many cases to vote in acquittal and to abide by their oath meant that the jury had to suppress their personal feelings and prejudices.

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[1] Hell. ii. 4. 43.
[2] Isocrates vii. 67-68.
[3] Ath. Pol. xl. 2.

CHAPTER XII

RESPONSIBILITY OF THE JURORS

We have noticed[1] that the frequent appeal to the dicastic oath was mainly used to make the juror feel individually responsible. There were other ways whereby litigants tried to impress the jury with such a feeling. Most of these were ultimately connected with public opinion. In Athens appeals to this force were restricted by the fact that in theory and general practice the jury and the people were regarded as the same. All the appeals to the feelings and prejudices of the jury which have been treated above are in a sense appeals to Athenian public opinion.

Some few passages imply that the jury, when sitting in judgment, sometimes separated itself from the general body of Athenians and did not have the common feelings which the litigants naturally expected.

> What is most absurd of all is the fact that when one of us is on trial, he denounces the calumniators, but when he sits in judgment upon another, he is no longer of the same mind concerning them. Yet, surely, intelligent men ought to be such when they are judges of others, as they would expect others to be to them in like case, bearing in mind the fact that because of the audacity of the sycophants it is impossible to forsee what man may be placed in peril and be compelled to plead, even as I am now doing, before men who are to decide his fate by their votes.[2]

Closely connected with such statements are appeals that the jury put themselves in the speakers' situation and then consider how they would feel or what they would do, with the implication of

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[1] Supra, p. 18.

[2] Isoc. xv. 23; cf. Dem. xxi. 220.

course that they ought to have the same feelings as the defendant.[1] It is likely, however, that all appeals of this type are rhetorical in nature and used for the sake of greater effect, since any litigant will try to make out that public opinion is on his side and that the jury, in disregarding his arguments is going counter to the feelings of the people.

At times the jury is said to be on trial before the Athenians. Demosthenes says that, since Aristogeiton places his hope of safety in the enormity of his wickedness, the jury is on their probation and their character is at stake.[2] Dinarchus says that Demosthenes is on trial before the jury and the jury before the rest of the people.[3] Litigants had to assume and make the jury feel that it was not the Athenian state but some board subject as it were to the audit of the rest of the people. Should such a procedure become custom, it would on the whole be detrimental to the interests of the litigant, since most appeals are made on the theory that the jurors' opinion is the same as that of all Athenians. The suggestion that the jurors be subject to the opinions of their fellow citizens would not be flattering to their sense of power and importance.

In their attempts to influence the jurors litigants often appeal to the opinion of the crowds surrounding the court room. In cases of any great importance this 'corona' would be composed not only of Athenians but also of foreigners. Once Demosthenes said:

> One thing further, and I have done. You will go forth presently from the court, and all who have stood around,

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[1] Andoc. i. 57; Lys. i. 1; Dem. xxi. 108; xxxiii. 21; xxxix. 41; xlv. 86-87.

[2] Dem. xxiv. 6; cf. Aes. iii. 247.

[3] i. 1-2; cf. ii. 19; Lys. xxviii. 10; Dem. xx. 83.

> foreigners as well as citizens, will take a view of you, and will look at every man who passes, one by one, and know those who have given votes of acquittal by their countenances. What will you say then, men of Athens, if you go forth as persons who have abandoned the laws? With what faces with what eyes will you meet the gaze of each beholder? What will you say, Athenians, what will you say, should anyone guess the acquitting jurors and put the question to you? (Will you deny you voted acquittal), then you'll execrate those that did, each thus giving proof that he was not one of them. And wherefore resort to this, when good words might be on your lips, when all might implore blessings for all, you yourselves and the rest of the Athenians for you, and I may add the foreigners also and their wives and children? For the defendant's mischievious activity has reached, verily it has reached all; and all would rejoice to be delivered from his wickedness, and to see punishment inflicted upon him.[1]

In a similar manner Aeschines uses the supposed opinion of the crowd of foreigners and citizens about the court in his speeches against Timarchus[2] and Ctesiphon.[3] Lysias uses the same appeal in his speech against Eratosthenes[4] and Dinarchus in the speech against Demosthenes in connection with the Harpalus affair.[5] Athenian opinion is not used alone but is coupled with that of foreigners. In a few cases however, the opinion of specific groups of Athenians is used. Thus Demosthenes appeals to the feelings of the commercial people[6] and Isocrates, to the probable reaction of the citizens who are dependent on the amnesty.[7]

Although it was difficult to bring outside influences directly to bear on the jury, litigants achieved the same result by using the probable effect of the feeling, which the verdict might cause, to influence the jurors. This feeling had the same bases as the opinions and prejudices of the jury to which litigants generally appealed. The most frequent one was the advantage

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[1] Dem. xxv. 98-101.
[2] i. 117 f.
[3] iii. 8, 56.
[4] xii. 35.
[5] i. 22-23, 46; cf. Hyper. v, col. 22.
[6] Dem. lvi. 48-50; Lys. xxii. 21-22.
[7] xviii. 42.

or disadvantage accruing to the state. A good example of this type is found in Demosthenes.

> Granting however most fully that the whole Council are now upon their trial, see how much more it is for your interest to convict them than not to convict. If you acquit them, the Council-chamber will be ruled by the speakers; if you convict them, it will be ruled by the ordinary members: for the majority, having seen this Council deprived of their crown through the bad conduct of the speakers, will not leave the business in their hands, but advise themselves what is for the best. And if this should take place, and you should be quit of the old set of orators, you will see all things going on as they should do, O Athenians.[1]

The statement is also made that the jury's decision on a case will determine the attitude of the city for all time toward such cases.[2] Often the appeal takes the following forms: who will be zealous in your service or patriotic or endure risks on your behalf if you do not convict this man;[3] you will give license to wrong doing;[4] you will give up the possibility of controlling men by the courts and the laws;[5] you will cause men to bargain with sycophants instead of coming to the courts;[6] you will be deprived of the privilege of bestowing citizenship;[7] if you do not vote in accordance with the law or laws you invalidate them.[8] There are also statements from the opposite point of view; if you vote with us you will not lack those who will aid the state;[9] punish him and every thing connected with public affairs will be administered in accordance with the laws.[10] In essence the above types do not dif-

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[1] Dem. xxii. 37.
[2] Lys. xiv. 4; xv. 9; Lyc. 9; Dem. xix. 232; l. 66.
[3] Lyc. 54; Dem. xix. 232; xx. 22; xxi. 66; xxii. 19; l. 64.
[4] Lys. xxx. 23; Dem. xxi. 4; xxiii. 94.
[5] Aes. iii. 230; Dem. xlii. 15; Din. i. 113.
[6] Ant. v. 80.
[7] Dem. lix. 13. [8] Lys. i.35-36; Aes. i.90-91; Dem. xxiv.5.
[9] Aes. ii. 183; Dem. xx. 166; xxiii. 5.
[10] Lys. xxx. 35.

fer from the ordinary appeal to the feelings and prejudices of the jury. They do not look to the present, however, but to the future. In reality the litigant obtains the same effect as that of the direct use of public opinion by appealing to the feelings of the jury projected into the future, yet the jurors and the people are not separated.

There was a development of this type of appeal which may be called the theory of punishment.[1] The speaker ascends to an ethical plane and asserts that the verdict will make men better or worse. The effect is the same but the aspect is changed. Plato presents the theory in a pure form. In the Laws he says:

> He shall pay the penalty, not because of the wrong doing--for what is done can never be undone--but in order for the future both he himself and those who beheld his punishment may either utterly loath his sin or at least renounce to a great extent such lamentable conduct.[2]

In the orators frequently the basis is the benefit of the state through the betterment of the citizens.

> He has arguments also upon other points, which are admirably contrived for your deception; it is better that you should be informed of them beforehand. He has one to this effect, that you should not deprive of their reward or involve in disgrace five hundred Athenian citizens: "They are upon their trial," he says, "not I." Now if you were about to deprive them only, and to confer no benefit upon the commonwealth, I would not have had you trouble yourselves much about it: but by doing so you will encourage more than ten thousand other citizens to become better men, how much to your credit is to make so many persons honest, than to oblige five hundred unjustly.[3]

The betterment of the character of the youth is also frequently used as a basis. Lycurgus says:

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[1] Mr. H. L. Tracy in an unpublished University of Chicago dissertation, The Theory of Punishment in Greek Literature, treats this fully in its ethical and philosophic aspects. Cf. Dorjahn, "Precedent in Athenian Courts," Philological Quarterly, VII, 380ff.

[2] Plato Laws 934 A; cf. Gorg. 525 B; Protag. 324 B; Anax. Rhet. ad Alex. 1420 a 25 ff.; 1427 a 15 ff.

[3] Dem. xxii. 35. Cf. Lys. xiv. 12; xxvii. 5; xxxi. 30; Isoc. xx. 12; Din. i. 27.

> It is necessary for you to leave your verdict as an example to those who are yet to be born, knowing well, gentlemen, that you will not only punish this man, if you condemn him, but you will turn all the youth to virtue. There are two things that educate youth, the punishment of those who commit crimes, and the rewards given to good men. Looking to each of these things, they flee the one through fear, and they desire the other on account of its fair reputation.[1]

Lysias once based the appeal on the discipline of the soldiers[2] and in the speech against Neaera Demosthenes appeals to the bad effect an acquittal would have on the character and morals of women.[3] In many cases arguments such as these became shortened to the formula that the jury will make or ought to make an example by their decision. Similarly litigants argue that, since a case has come to trial, there must be a conviction inasmuch as the example set by an acquittal would be detrimental, otherwise it were better the case had never come to trial.[4]

The use of precedent is closely connected with the feelings and prejudices of the jurors.[5] In the Anglo-American system, laws are defined and established by court decisions but only the decision of a judge can establish legal precedent. Thus at Athens there could be no legal precedent from our point of view.[6] At

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[1] Lyc. 9; cf. Aes. i. 187, 191; iii. 187; Lyc. 7; Dem. xix. 285; xx. 124; xxxvii. 60; xxxviii. 22.

[2] xv. 9.

[3] Dem. lix. 110 ff.

[4] Dem. lix. 112; Plato Apol. 29 C; Aes. i. 192; cf. Lys. i. 47-50.

[5] From the legal point of view this topic is treated exhaustively in the article of A. P. Dorjahn which is cited above. Cf. Bonner, Lawyers and Litigants, pp. 181-83.

[6] Dorjahn, Precedent, p. 378. Cf. A Companion to Greek Studies, Whibley, pp. 176-77 (article on Law by Wyse). Professor Bonner says (Lawyers and Litigants, p. 182), "the effect of Athenian precedents was not legal but psychological." Anaximenes says (Rhet. i, pp. 8-9, ed. Spengel; cf. Dorjahn, Precedent, p. 375) that such citations are helpful in the interpretation of the law, while Aristotle urges (Rhet. 1398 b 20 ff.) that the citation of previous cases which are familiar to the jurors be used. These statements show that the use of precedents falls into the same category as the other appeals.

Athens it was a means to influence the opinion of the juror by showing that in a similar situation the jurors voted in a certain way, and that they should not now act in a way inconsistent with their former acts. The closest approach to the discussion of precedents in a modern court is in the speech of Demosthenes against Meidias.[1] He cites several cases in which heavy penalties were given for offenses committed during the Dionysiac festival.[2] There are also a few other examples approaching those in this speech.[3] In his defense of Ctesiphon, Demosthenes said that on a previous occasion it had been proposed that he be crowned by a decree which was identical with that of Ctesiphon. This decree had been indicted by Diondas but he failed.[4] Aeschines who spoke first, suspecting that Demosthenes would make such a move, said:

> While the defendant, if by any chance he does touch on the question at issue, pleads, not that his motion was lawful, but that on some past occasion another man has made an equally unlawful motion and been acquitted; a plea in which I hear Ctesiphon now places great confidence.[5]

Euthycles, in anticipation of precedents which Aristocrates was expected to cite, said:

> Again, Athenians: it has not escaped me that Aristocrates, having no straightforward or honest defense to urge, will resort to fallacies of this kind--that similar decrees have been drawn up by many persons before. This, men of Athens, is no proof that the defendant has made a legal motion.[6]

In the oration Against Leptines, Demosthenes cites the case of Laodamus who failed when he indicted a decree granting hereditary

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[1] Bonner, Lawyers and Litigants, pp. 181-83. Cf. Dorjahn, Precedent, p. 376.

[2] Dem. xxi. 58-62; 175 ff.; cf. 75.

[3] Lys. xiii. 56; Dem. xxxvi. 28-29.

[4] Dem. xviii. 222-24. Cf. Dorjahn, Precedent, p. 376, n.11.

[5] Aes. iii. 193; cf. §§10, 12; cf. Dem. lvi. 31.

[6] Dem. xxiii. 95 ff.; cf. xxii. 6-7.

immunity from taxation.[1]

These may be considered roughly to approach a legal use of precedent. But frequently cases are cited which are not exactly parallel but more general in their application. For instance, litigants will cite as an example the punishment for an offense similar to but less serious than the one in question.[2] In these cases it is obvious that it is only the opinion of the jurors to which an appeal is made. In all likelihood this is the original type and Demosthenes developed it into what approaches legal precedent.

It is impossible to tell how great an influence the citation of precedents had on the jury. However their frequent use in a general way seems to show that litigants thought them useful. In the more exact uses of precedent the arguments against it seem to show a fear on the part of the litigant that the jury will be influenced. Professor Dorjahn[3] thinks that it is probable that the verdicts handed down in the early cases which involved the amnesty served as a general guide to later judges. Also he says that in complicated cases, which were not specifically defined by law, precedent may have had considerable force.[4]

Also the feeling of responsibility of the jurors was often strengthened by appeals to foreign opinion. These fall into two classes. The first was based on the prestige and reputation of Athens. The Athenians wanted their state to be an object of praise throughout all Greece. In cases which involved more than local problems and policies the influence of foreign opinion was

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[1] Dem. xx. 146.

[2] Andoc. i. 29-30; Lys. xxix. 11; xxxi. 26; Hyper. iv. 1-3; v, col. 26; Lyc. 53; Dem. xix. 276 ff.; lix. 116-17; Din. i. 16, 23-24; ii. 15, 24 ff.

[3] Precedent, p. 384.

[4] Cf. Lyc. 52.

likely to be great.[1] The Athenians were proud of the fact that their laws and institutions were imitated by other states.[2] Demosthenes says:

> You should look at this also, that many of the Greeks have often passed resolutions to adopt your laws; a circumstance in which you take a pride, very naturally . . . . You should be anxious therefore to make them appear as good as possible, and to punish those who corrupt and impair them; for, should they suffer by your neglect, you will be deprived of this honor, and will create an unfavorable opinion of the commonwealth.[3]

Accusers say that, since the character of the defendant is well known to all Greeks, there must be conviction; otherwise the reputation of the city will suffer. Lycurgus says:

> It is necessary, men of Athens, that this should not escape you, that the case of this man is quite different from that of the rest of the private citizens. For concerning a man unknown to the Greeks, you would seem to vote well or badly in your own community; but concerning this man, whatever you decide will be talked about by all Greeks who know the deeds of your ancestors were quite opposed to the defendant's conduct. For he is notorious on account of his voyage to Rhodes, and the report he made against you to the state of the Rhodians and to those of the merchants who were putting up there, who sailing over all the inhabited world by way of trade at the same time reported whatever they heard about the city from Leocrates. Thus you must consider it of great importance to decide rightly about him. For know well, men of Athens, that where you especially surpass the rest of men, in piety, filial respect, and patriotism, there you would seem especially neglectful, should he escape punishment at your hands.[4]

Lysias uses a similar argument against Alciabides the Younger[5] and also in the speech against Andocides.[6] There are many other statements addressed to the jury which maintain that the reputation of Athens will suffer if the verdict is not what the litigant desires. That the city seem ridiculous and that the Athenians will be blamed form the common themes. Demosthenes gives a typical example.

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[1] Cf. examples cited on p. 131.
[2] Cf. Thuc. ii. 37.
[3] Dem. xxiv. 210; cf. Lyc. 83.
[4] Lyc. 14-15.
[5] xiv. 13.
[6] vi. 5.

> As it stands this law reflects on your city, not honor but disgrace, unworthy of your ancestors and of yourselves; for Athens is incurring the three worst reproaches--that men should think us envious, faithless, ungrateful.[1]

In a similar manner the litigant will represent the course of action he desires as in accordance with the city's reputation while suggesting that the opposite will cause the opinion toward the city to be changed.[2]

The second class of appeal to foreign opinion was based on international advantages and disadvantages. While it was possible to appeal to the prestige of Athens abroad in any speech, the second type depended on definite circumstances and the attitude of the city in international affairs. Before the final stages of the struggle with Macedon no forensic speeches which deal principally with foreign problems survive. But in the speech against Eratosthenes Lysias implies that foreigners will not ban the Thirty from their cities if the defendant is not condemned. In a private suit the client of Isocrates appeals to the benefits his father and Satyrus, the ruler of Pontus, conferred on the Athenians. He says that in times of scarcity they gave the Athenians sole right to export grain and in the commercial suits of which they were the judges they always gave them more than equal advantage.[3] The Law of Leptines enacted that no citizen, metic, or alien, with the exception of the descendants of Harmodius and Aristogeiton, should enjoy exemption from the ordinary public burdens. In the action which seeks to annul the law, Demosthenes appeals to the detrimental result it may have on benefactors of Athens. Leucon,

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[1] Trans. J. H. Vince. Dem. xx. 10; cf. Lys. ix. 20; Lyc. 101, 110; Aes. iii. 231; Dem. xviii. 20; xx. 50, 134, 164-65; Din. iii. 21; Plato Apol. 35 B.

[2] Cf. Andoc. i. 140; Isoc. xviii. 28-31, 46; Lyc. 75; Din. iii. 19, 22.

[3] Isoc. xvii. 57.

king of the Bosporus, had been given honorary citizenship along with immunity from Athenian public burdens. Should this immunity be taken away, argues Demosthenes, Leucon will no longer be friendly to Athens and will likely in reprisal take away the immunity from the export tax on grain which he had granted to Athenian merchants.[1] The decree of Aristocrates honored Charidemus, a Thracian prince and mercenary leader, and made his person sacrosanct. In attacking the legality of this decree Demosthenes evidently fears his opponent will say that if the decree is annulled the prince will be discouraged from further service to Athens. Demosthenes feels that he must disparage the good will of Charidemus.[2]

The extant forensic speeches which are connected with the rise of Macedon come late, 345-330. It was no longer possible for Demosthenes to appeal specifically to the international advantages which might result from foreign feeling in favor of his policy, since at the times he delivered his two speeches Athens stood alone. Once he says:

> And which of your fellow-citizens, or rather the Greeks at large, will not have reason to complain of you, seeing that you are wroth with Philip, who, in the transition from war to a treaty of peace, purchased his advantages from those who would sell them, a thing very venial in him; yet you acquit this man, who so disgracefully sold your interests, although the laws prescribe the heaviest penalty for such conduct.[3]

On the other hand the Macedonian party could say that Demosthenes would cause Philip to be hostile to Athens. Demosthenes says:

> Perhaps however an argument of the following kind may be advanced by these men--that it will cause enmity with Philip, if you convict the ambassadors who negotiated the peace.[4]

In the prosecution of Ctesiphon Aeschines says:

> And mark well the occasion on which you are casting your vote. A few days hence the Pythian games are to be celebrated and the synod of Hellas assembled. Our city is already the object of slander in consequence of the policies

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[1]Dem. xx. 29-40.
[2]Dem. xxiii. 194 ff.
[3]Dem. xix. 133.
[4]Dem. xix. 134.

> of Demosthenes in connection with the present critical situation. If you crown him you will seem to be in sympathy with those who violate the general peace, whereas if you do the opposite, you will free the people from these charges.[1]

Yet Aeschines did not build his case about such an appeal. He could not hope that it would convince the Athenians and the result of the case proves it did not. However under normal conditions the Athenians must have been very susceptible to appeals based on foreign opinion, since the prestige of Athens and the advantage of the state, upon which they were based, were motivating forces in their national character.

Since by a legal fiction the Athenian jurors were identified with the whole people it was difficult to bring public opinion to bear upon them and thus accentuate their actual responsibility. However litigants developed other ways to secure the feeling of responsibility they desired. All these have the feelings and prejudices of the jurors as their base. Usually the speakers told the jurors that by their verdict they would create a state of opinion which in the future would affect them advantageously or disadvantageously, in the hope that thus their present decision would be influenced. The theory of punishment developed from this type of appeal. The Athenian use of precedent depended on the effect past occurrences would have on the present feelings of the jurors. Foreign opinion, since it mainly appealed to the prestige of Athens and the advantage of the state, comes into this same classificatio It is likely that the psychological effect of all these appeals would emphasize the actual responsibility of the jurors more than the direct use of the feelings and prejudices upon which they are based; for, the round about way the appeal takes, on one hand, makes it seem universal rather than specific and, on the other hand, causes the juror to view it in an apparently disinterested light.

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[1] Aes. iii. 254.